80-492

Supreme Court, U. S.
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NO.

in the

Supreme Court of the United States

OCTOBER TERM, 1980

CALVIN M. ANDERSON,

Petitioner,

versus

THE HONORABLE BENJAMIN F. BAILER, POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, THE HONORABLE JAMES E. WORKMAN, JR., POSTMASTER/SECTIONAL CENTER MANAGER OF THE UNITED STATES POSTAL SERVICE, JACKSONVILLE SECTIONAL CENTER FACILITY, THE UNITED STATES POSTAL SERVICE, and THE UNITED STATES OF AMERICA

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

I.

IS THE DISCRETIONARY FUNCTION EXEMPTION TO THE FEDERAL TORT CLAIMS ACT JURISDICTIONAL SO THAT IT MAY BE RAISED AT ANY TIME OR IS IT AN AFFIRMATIVE DEFENSE WHICH MUST BE RAISED IN THE ANSWER AND DEEMED TO BE WAIVED IF NOT TIMELY RAISED.

II.

DOES THE UNITED STATES POSTAL SERVICE HAVE THE DISCRETIONARY POWER TO REFUSE AN AWARD UNDER THE INCENTIVE AWARDS ACT FOR A SUGGESTION THAT IS USED AND WHICH RESULTS IN CERTAIN MINIMUM TANGIBLE BENEFITS.

III.

DID THE DISTRICT COURT HAVE JURISDICTION TO CONSIDER CLAIMS AGAINST THE UNITED STATES POSTAL SERVICE PURSUANT TO 39 U.S.C. 401(1) and 409 BASED ON IMPLIED CONTRACT AND CONVERSION OF PROPERTY RIGHTS.

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OCTOBER TERM, 1980

CALVIN M. ANDERSON,

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THE HONORABLE BENJAMIN F. BAILER, POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, THE HONORABLE JAMES E. WORKMAN, JR., POSTMASTER/SECTIONAL CENTER MANAGER OF THE UNITED STATES POSTAL SERVICE, JACKSONVILLE SECTIONAL CENTER FACILITY, THE UNITED STATES POSTAL SERVICE, and THE UNITED STATES OF AMERICA

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980
No.

Petitioner, Calvin M. Anderson, respectfully prays this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of the court below affirming *per curium,* without opinion, the order of the District Court of the United States, Middle District of Florida, dismissing with prejudice the action filed by Petitioner.

The opinion of the District Court is found at 459 F.Supp. 792 and is attached as pages 1 through 11 of the Appendix.

The judgment of the Court of Appeals has not at the filing of this Petition been officially reported but is, together with the court's denial of Petitioner's motion for rehearing, attached as pages 12 through 14 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeal for the Fifth Circuit was entered June 6, 1980, affirming *per curium,* the order of the District Court of Appeal, Middle District of Florida, dated October 24, 1978, dismissing with prejudice the action filed by Petitioner. The Court of Appeal denied a timely petition for rehearing on June 30, 1980. The jurisdiction of this court is invoked under Title 28 U.S.C. §1254(1).

The following statutes and regulations, relevant to a determination of this Petition are attached as pages 15-25 of the Appendix:

Title 39 U.S.C. §401
Title 39 U.S.C. §409
Title 28 U.S.C. §1339
Title 28 U.S.C. §2671
Title 28 U.S.C. §2674
Title 28 U.S.C. §2680(a)
Title 5 U.S.C. §4501
Title 5 U.S.C. §4502
Title 5 U.S.C. §4503
Title 5 U.S.C. §4506
5 C.F.R. §451.302 (1976)
5 C.F.R. §451.304(b) (1976)

STATEMENT OF THE CASE AND FACTS

Petitioner was a career status postal employee assigned to duty as a mail clerk in the Post Office in Jacksonville, Florida.

On October 9, 1961, and for the various years thereafter through 1973, Petitioner, pursuant to the provisions of the Post Office Department Employees Suggestion Incentive Program, submitted to the United States and to the Postal Service written suggestions that a special, seasonal, pre-cancelled, preforated Christmas stamp be issued, sold and used by them to cut costs, speed up, and otherwise facilitate Post Office Department operations.

On October 17, 1961, and for the various years thereafter, through 1973, the United States and the Postal Service officially disapproved Petitioner's suggestions.

In the calendar years of 1969, 1970, and 1974, the United States and the Postal Service, accepted Petitioner's suggestions and issued, sold and used his pre-cancelled Christmas stamp idea resulting in a substantial reduction of or savings to them in postal expenditures.

On November 4, 1975, Petitioner submitted his written tort claim for damage or injury to the Postal Service pursuant to Title 28 U.S.C. §2675(a).

On November 18, 1975, the Postal Service denied Petitioner's claim for injury and damage.

Pursuant to the instructions as described in the Postal Service's denial of his tort claim, on May 14, 1976, Petitioner filed the present action in the United States District Court, Middle District of Florida.

Benjamin F. Bailar, at the time of the filing of the complaint, was the Postmaster General of the United States Postal Service.

James E. Workman, at the time of the filing of the complaint, was the Postmaster of the Jacksonville Division of the Postal Service. Prior to the reorganization of the Post Office Department in 1971, Workman was the Postmaster of the United States of America, Post Office Department, Jacksonville, Florida.

This action was commenced on May 14, 1976, in the United States District Court, Middle District of Florida, as an eight count cause of action for the recovery of damages in excess of $10,000.00, based, in part, upon the denial by Postal Service of the Petitioner's tort claim in the sum of $25,000.00, and in part on implied contract and conversion of property rights. Jurisdiction was invoked pursuant to both the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.* and 39 U.S.C. 401 and 409.

Count I of the complaint asserted that in 1974, the Postal Service converted to its own use the Petitioner's suggestion valued in excess of $10,000.00

Count II alleges the same basic conduct, however, it also alleges that the Postal Service knew that when the Petitioner was making such suggestions, Petitioner expected to be paid upon the use thereof by the Postal Service. Count II further alleges that in 1969, the United States accepted his suggestion and issued, sold and used the special stamp to cut costs and speed up and otherwise facilitate Post Office Department operations resulting in a substantial reduction or savings to the United States of America in postal expenditures in the aforesaid period.

Count III alleges the same basic conduct as alleged in Count II except that the use of Petitioner's suggestion and resulting saving to the United States occurred in the calendar year of 1970.

Count IV alleges the same basic conduct as alleged in Count II except that the use of Petitioner's suggestion and resulting savings to the Postal Service occurred in 1974.

Count V alleges that there was an implied understanding between the Petitioner and the Postal Service that Petitioner was to be compensated if his suggestion were used. Further, in 1969, the Postal Service accepted Petitioner's suggestion and utilized it in connection with the issuance, sale and use of the special stamp resulting in substantial reduction or saving to the United States in postal expenditures.

Count VI alleges the same basic conduct as alleged in Count V except that the acceptance and use of Petitioner's suggestion and resulting savings to the Postal Service occurred in 1974.

Count VIII alleges that there was an express agreement between Petitioner and the United States and the Postal Service that the Petitioner would be compensated in the event Petitioner's suggestions were used by them resulting in tangible or intangible benefits to them. Count VIII sets forth applicable portions of the regulations and instructions prescribed by the Civil Service Commission under which the Post Office Department Employee's Suggestion Incentive Program is carried out. Count VIII further alleges that it was the policy of the United States and the Postal Service to solicit suggestions from employees and that Petitioner was aware of said policy; further, that Petitioner knew that the Respondents, from time to time, compensated employees who made suggestions useful to them. In addition, that Petitioner had requested from the Respondents payment of the award of $25,000.00, but that said Respondents have arbitrarily denied said award, have made a gross or palpable mistake in the administration of said regulations in denying payment of said award to Petitioner and/or Respondents have

neglected or abused its discretion in the administration of said regulations in denying payment of said award to Petitioner, or that Respondents have acted without the limits of their authority as defined by said regulations. As a result of their actions, Respondents owe Petitioner the maximum cash award of $25,000.00.

Respondents filed their Answer on August 13, 1976, denying generally the allegations of wrongdoing in the charging paragraphs of the complaint; no affirmative defenses were asserted by Respondents.

On December 28, 1976, Petitioner filed and served his request for admissions under Rule 36, Fed.R.Civ.P.

Following the failure of Respondents to file the required responses to the request for admissions, on February 4, 1977, Petitioner filed his motion for summary judgment pursuant to Rule 56(a), Fed.R.Civ.P., alleging that there was no genuine issue as to any material facts and that Petitioner was entitled to a judgment as a matter of law against the Respondents based upon the pleadings and the request for admissions under Rule 36 filed therein.

On March 1, 1977, Respondents filed their motion for enlargement for time within which to respond to Petitioner's request for admissions and response to Petitioner's motion for summary judgment. On March 3, 1977, Respondents filed their memorandum in support of their motion to enlarge time.

On March 21, 1977, Petitioner filed his motion to strike Respondents' motion for enlargement, together with his memorandum of law in support thereof.

Without a hearing and without any notice to Petitioner, the United States Magistrate entered his order on March 30, 1977, granting the Respondents' motion to enlarge time and allowing the Respondents one day, until March 31, 1977, to respond to Petitioner's request for admissions.

On April 1, 1977, the Petitioner simultaneously received the Magistrate's order, and the Respondents' response to request for admissions under Rule 36. No prior notice was received by Petitioner of the Magistrate's order of March 30, 1977.

Following verbal objection by Petitioner to the entry of the said order, the Magistrate, on April 4, 1977, set a hearing on Petitioner's motion to strike Respondents' motion to enlarge time for April 14, 1977.

Following that hearing, the Magistrate entered his order and report and recommendation, dated June 2, 1977, recommending to the United States District Judge that Petitioner's motion to strike and motion for summary judgment be denied.

On May 19, 1978, some twenty-one months after filing their answer, the Respondents filed their motion to dismiss complaint and memorandum raising for the first time the discretionary function exception to the Federal Tort Claims Act.

On June 9, 1978, Petitioner filed his motion to strike Respondents' motion to dismiss complaint and memorandum.

A hearing was held before the Honorable George C. Carr, United States District Court Judge, on July 20, 1978, on Respondents' motion to dismiss complaint.

On October 24, 1978, the District Court filed its memorandum opinion and order dismissing Petitioner's case with prejudice.

On November 20, 1978, Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Fifth Circuit.

After submission of briefs and oral argument, the court entered its *per curium* affirmance on June 6, 1980.

Petitioner filed his petition for rehearing which was denied on June 30, 1980.

REASONS FOR GRANTING THE WRIT

I. On the important issue of whether the discretionary function exemption to the Federal Tort Claims Act is jurisdictional so that it may be raised at any time, even after trial, or whether it is an affirmative defense which must be properly plead and proven, the lower court's decision and opinion directly conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in *Stewart v. United States,* 199 F.2d. 517 (7th Cir. 1952).

As the District Court below noted, 459 F.Supp. at 794, the subsequent case law which addresses this point seems to be a "patchwork quilt" with some courts following *Stewart,* see, e.g. *Clemente v. United States,* 422 F.Supp. 564 (D.P.R. 1976); *Neher v. United States,*

265 F.Supp. 210, (D. Minn. 1967) considering the exceptions to be defenses.

Other circuits view the exceptions as jurisdictional and raisable at any time, see, e.g. *Smith v. United States,* 546 F.2d. 872 (10th Cir. 1976); *Morris v. United States,* 521 F.2d. 872 (9th Cir. 1975); *Griffin v. United States,* 500 F.2d. 1059 (3rd Cir. 1974); *United States v. Taylor,* 236 F.2d. 649 (6th Cir. 1956); *Koheeny v. United States,* 388 F.2d. 59 (8th Cir. 1957). (The Court in *Blessing v. United States,* 447 F.Supp. 1160 (E.D. Pa. 1978) has presented a detailed background of the dispute between courts over this question. *Id* at 1167, footnote 6.)

The court in *Stewart* at 519 cited *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) as supportive of its view that the exceptions do not go to jurisdiction but rather to allowable claims. See also *Air Transport Associates v. United States,* 221 F.2d. 467 (9th Cir. 1955). The circuits holding otherwise raise *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1247 (1953) as supportive of their view that the exceptions are jurisdictional.

Both Supreme Court cases do not really address the question and all the courts were hard pressed to glean direction from the Supreme Court on this important question. In fact, as the court in *Blessing* noted, even in *Dalehite,* supra, this court spoke of jurisdiction but behaved otherwise, affirming judgment for United States rather than dismissing for want of jurisdiction.

It is clear that a continuing conflict between

circuits exists on the issue and petitioner respectfully submits that it is vital that this question be decided finally by the Supreme Court.

As the Federal Tort Claims Act is one of the most often used vehicles for claims against the federal government and as the discretionary function exception appears to be the favorite defense of federal attorneys, it is evident that countless future litigants will benefit from a clarification of this point.

As the court in *Stewart v. United States*, supra, stated:

> . . . Its acceptance (exceptions as jurisdictional) would lead to incongruities which should be avoided if possible. Finality in litigation could never be certain. . . . If the government's position were sustained, it would require a plaintiff in his complaint, in order to show jurisdiction, to negative all the provisions of Chap. 171 . . . and the necessity for negativing such exceptions in the complaint would impose upon the plaintiff the burden of proving such negative averments. Such a result would border on the preposterous. *Id* at p. 520.

Those courts recognizing the exceptions as jurisdictional have not in any of the cases expressed any reasoning for so holding. They have simply relied on the fact that another court held so previously. The court in *Stewart* was the only one to use logic and consider the practical effect of the exceptions as defenses or jurisdictional issues.

This case appears to be well-suited for a determination of this issue. It was not until 22 months after United States filed its Answer that it raised discretionary function exception as an issue. Discovery had been taken and a motion for summary judgment considered. Yet at no time during these earlier actions did United States raise the exception.

Petitioner will submit in its Brief on the Merits, that whether a discretionary function exists is a factual issue and best suited as an affirmative defense to be proven at trial. Moreover, there are very few legal principles which can be used by the courts as guidelines for determining on motion whether a discretionary function in fact exists.

Petitioner respectfully requests that the conflict between circuits on this important issue be settled by this Court.

II. More important for litigants and United States is the question of what exactly is a discretionary function and what principles should courts use in deciding whether what exists is properly a defense to a litigant's attempt to recover from United States in a Federal Tort Claims Act suit.

Petitioner raises the issue as it relates to this case and asks whether the United States Postal Service has the discretionary power to refuse an award under the Incentives Awards Act (5 U.S.C. §4501 *et seq.*) for a suggestion that is used and which results in certain minimum tangible benefits.

This court in *Dalehite v. United States,* supra, chose at that time not to clearly define discretionary function, but instead set a broad standard upon which other courts have expanded, stating:

> . . . (The discretionary function) also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation. Where there is room for policy judgment and decision, there is discretion. 346 U.S. at 35, 36.

In *Griffin v. United States,* 500 F.2d. 1059 (3rd Cir. 1974) the court held that the Government may be liable where its employees, in carrying out their duties, fail to conform to pre-existing statutory and regulatory requirements, and that there does not exist discretion to disregard a regulation. The court therein stated:

> . . . The violation of a non-discretionary command takes what otherwise might be characterized as a "discretionary function" outside the scope of the statutory exception . . . Liability, in such cases, is predicated not on a negligent or unwise policy determination, but on the failure of Government employees to conform to and act consistently with the authority delegated. 500 F.2d. at 1068, 1069.

Petitioner respectfully submits that the decision below conflicts in principle with the holdings of the court in *Griffin v United States,* supra. Pursuant to the provisions of 5 U.S.C. §4506, the Civil Service Commission prescribed the regulations under which the

Postal Service Employees Suggestion Incentive Program is to be carried out. The applicable portions show that if certain tangible benefits are derived from suggestions used, a cash award at the rate contained in the regulation "shall be granted":

> "Section 451.302 (1976) Cash award, tangible benefits . . .
>
> (b) Optional minimum award levels. Three minimum award levels are provided to allow agencies to choose the minimum level which would be most appropriate to the circumstances in which the agency operates. The minimum award level selected by the agency must be incorporated in the agency plan.

The optional minimum award levels are:

	Minimum award	Based on minimum tangible benefits totalling
Option A	$ 25	$ 250
Option B	50	500
Option C	100	1,000

> A cash award shall not be granted for a contribution which does not meet the minimum award level selected by the agency. A cash award at the rate shown in paragraph (c) of this section shall be granted for a contribution which meets the minimum award level selected by the agency.

(c) Award scale. The amount of a cash award for tangible benefits shall be based on the following table, except when a different amount is justified for special reasons.

Tangible Benefits	Amount of Award
$250-$1,000	Minimum award in accord with agency plan, plus $5 for each additional $50 of tangible benefits, or fraction thereof, above the minimum benefits required by agency plan.
$1,001-$10,000	$100 for the first $1,000 in benefits plus $5 for each additional $100 or fraction thereof.
$10,001-$20,000	$550 for the first $10,000 in benefits plus $5 for each additional $200 or fraction thereof.
$20,001-$100,000	$800 for the first $20,000 in benefits plus $5 for each additional $1,000 or fraction thereof.

$100,001 or more	$1,200 for the first $100,000 in benefits plus $5 for each additional $5,000 or fraction thereof.

(d) Award over $5,000. An agency head may not grant a cash award above $5,000 without prior approval of the Commission. The maximum cash award is $25,000" (A-73).

Section 451.304(b) (1976) states the effect of the acceptance by an employee of a cash award:

"(b) Further claim: The acceptance of a cash award under this part constitutes an agreement that the use by the Government of a contribution idea, method or device for which an incentive award is made does not form the basis of a further claim of any nature against the Government by the employees, his heirs, or his assigns" (A-75).

These regulations while recognizing the discretionary "policy judgment" of whether to accept and use an employee suggestion, still *require* awards when suggestions are used and tangible benefits result. This aspect then is not discretionary, nor a policy judgment, but instead is obligatory. The regulations in effect create and in §451.304(b) recognize the right to a claim for an award if a suggestion or other contribution is used and results in tangible benefits to the Government.

The decision of the court below stands in conflict with the principles enunciated in *Griffin v. United States,* supra, and *United Air Lines v. Wiener,* 335 F.2d. 379, 393-394 (9th Cir. 1964), cert. dismissed, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d. 549 (1964) (Air Force Command's designation of permissible flying areas, although an unreviewable "discretionary" determination had regulations been complied with, held removed from §2680(a) exception by Command's failure to make prior study required by regulation).

Petitioner requests that this court grant certiorari to consider whether or not the Incentive Awards Act and the applicable regulations create a right to an award if a suggestion or other contribution is used and tangible benefits result, or whether they describe a purely discretionary function.

III. Thirdly, petitioner requests that this court consider the issue of whether under 39 U.S.C. 401(1) and 39 U.S.C. 409(a) the United States District Courts have jurisdiction over non-tort claims such as implied contract and conversion of property rights, against the United States Postal Service.

Petitioner strongly feels error was committed when the lower court wrongly assumed in its opinion that this cause was solely brought under the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.* and its jurisdictional counterpart 28 U.S.C. §1346.

As this court can plainly see from petitioner's complaint, paragraph 2, jurisdiction was predicated on 39 U.S.C. 401 and 39 U.S.C. 409 as well as the Federal

Tort Claims Act, and contains in Counts I, II, V, VI and VII claims of implied contract and conversion of property rights.

A number of circuits have recognized district court jurisdiction over non-tort claims asserted against the Postal Service, see e.g. *White v. Bloomberg*, 501 F.2d. 1379 (4th Cir. 1974); *Kennedy Electric, Inc. v. United States Postal Service*, 508 F.2d. 1954 (10th Cir. 1974) (A thorough analysis of the extent of a district court's jurisdiction over both tort and non-tort claims against the Postal Service is contained in *Grasso v. United States Postal Service*, 438 F.Supp. 1231 (D.C. Conn. 1977).

It appears from a reading of the *Grasso* opinion that there is presented to litigants a great deal of confusion and uncertainty with regard to jurisdiction in a suit against the Postal Service. Petitioner respectfully requests this court excercise its supervisory role and eliminate the confusion by settling the jurisdictional question presented.

CONCLUSION

For the foregoing reasons, Petitioner, Calvin M. Anderson, respectfully prays this Honorable Court for a Writ of Certiorari to be issued reviewing the judgment of the court below affirming *per curium,* without opinion, the order of the District Court of the United States, Middle District of Florida, dismissing with prejudice the action filed by Petitioner.

Respectfully submitted this 26 day of September, 1980.

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that two copies of the Petition For Writ of Certiorari have been furnished, by mail, to: The Honorable John J. Daley, Jr., United States Attorney, and Ernst D. Mueller, Assistant United States Attorney, 409 Post Office Building, 311 West Monroe Street, Jacksonville, Florida, 32201, attorneys for Respondents; BENJAMIN CIVILETTI, Attorney General of the United States, Department of Justice, Constitution Avenue and Tenth Street, N.W., Washington, D.C. 20530, this 26 day of September, 1980.

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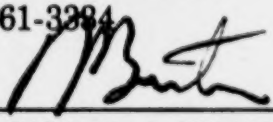
BY: 

RICHARD J. BURTON

Appendix

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 76-340-Civ-J-C

CALVIN M. ANDERSON,

Plaintiff,

vs.

THE HONORABLE BENJAMIN F. BAILAR, Postmaster General of the United States Postal Service; THE HONORABLE JAMES E. WORKMAN, JR., Postmaster/Sectional Center Manager of the United States Postal Service, Jacksonville Sectional Center Facility, THE UNITED STATES POSTAL SERVICE, and UNITED STATES OF AMERICA,

MEMORANDUM OPINION

This is an action under the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.*, and its jurisdictional counterpart 28 U.S.C. §1346. The case is presently before the Court on the Defendants' Motion to Dismiss the Complaint filed on May 19, 1978.

The Court notes at the outset that jurisdiction is lacking with respect to the individual named Defendants. Only claims against the United States are

included within the jurisdiction of the Federal Tort Claims Act. *See* 28 U.S.C. §1346(b).[1] No basis for ancillary jurisdiction has been asserted. Thus, the Motion to Dismiss, as it is based on this ground, must be granted as to all Defendants except the United States. *See Myers and Myers, Inc. v. United States Postal Service,* 527 F.2d 1252, 1256 (2d Cir. 1975).

With the claim against the United States remaining, the Court must now address itself to the arguments presented as to that Defendant. The Defendants contend that the Plaintiff's claim falls within the "discretionary function" exception of 28 U.S.C. §2680(a),[2] thus depriving the Court jurisdiction to consider the merits. The Plaintiff, on the other hand, asserts that the §2680(a) exception constitutes only an affirmative defense, and that the Defendants' failure to plead it in the answer to the complaint constitutes a

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[1]"Subject to the provisions of Chapter 171 of this title (the Federal Tort Claims Act), the District Courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages . . . for injury or loss of property . . . caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . ."

[2]The provisions of this chapter and section 1346(b) of this title shall not apply to: (a) any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

waiver of the defense. The Plaintiff in the alternative contends that the claim is not within the aegis of §2680(a).

Two questions are thus posed for the Court's consideration: (1) Is the §2680(a) exception jurisdictional such that it may be raised by the Defendants at any time? *See* Rule 12(h)(3) *F.R.Civ.P.* (2) If so, is the §2680(a) exception applicable here? For the reasons set forth below, the Court finds that both questions must be answered in the affirmative.

The Complaint generally states that the Plaintiff began his employment with the Defendants in 1961. He suggested at that time that the Post Office Department design and utilize a special precanceled postage stamp to be used during the month of December. The Plaintiff states that he periodically submitted the same suggestion through the years of his employment. The Plaintiff was advised on each occasion that his suggestion had been rejected. In 1974, the Post Office did use a precanceled, perforated stamp. As a result of this, the Plaintiff claims that he is entitled to a cash award under 5 U.S.C. §4503.[3] The Complaint alleges $25,000 in damages.

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[3]The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who (1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of government operations; or (2) performs a special act or service in the public interest in connection with or related to his official employment.

The Defendants contend that the question of whether or not to grant a cash award is entirely discretionary and thus cannot be the basis of liability under the Federal Tort Claims Act.

I.

The Plaintiff cites *Stewart v. United States,* 199 F.2d 517 (7th Cir. 1952), for the proposition that the §2680(a) exception is an affirmative defense which must be raised in the Answer, and that failure to do so will be deemed to be a waiver of that defense. In *Stewart,* the Government was granted a summary judgment in a Federal Tort Claims Act action. The Plaintiffs appealed and the Court of Appeals reversed, holding that the plaintiffs were entitled to recover. *Stewart v. United States,* 186 F.2d 627 (7th Cir. 1951), *cert. denied,* 341 U.S. 940 (1951). After remand, the Government was allowed to amend its original answer. In so doing, the §2680(a) exception was raised as a jurisdictional bar. The District Court ruled adversely to the Government on this issue and the Government appealed. The Court of Appeals affirmed, finding that 28 U.S.C. §1346(b) "conferred general jurisdiction of the subject matter of claims coming within its purview, and the exceptions referred to (28 U.S.C. §2680(a)-(n)) are available to the Government as a defense only when aptly pleaded and proved." *Stewart v. United States,* 199 F.2d at 519. The Court in *Stewart* noted that the Government had "procured a summary judgment in its favor, thereby representing that the Court had jurisdiction. It sought an affirmance of such judgment in this Court and thereby again represented that the District Court had

jurisdiction. After it had been defeated on the merits, this jurisdictional question was raised for the first time." *Id.* at 518.

The subsequent case law which addresses this point seems to be a "patchwork quilt." *See Blessing v. United States,* 447 F.Supp. 1160, 1167 (E.D. Pa. 1978). The weight of authority, however, holds that the §2680(a) exception is jurisdictional. In *Smith v. United States,* 546 F.2d 872 (10th Cir. 1976), the Court states:

> "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *United States v. Yellow Cab Co.,* 340 U.S. 543, 547 (1951). However, the waiver in 28 U.S.C.A. §1346(b) is limited by the several exceptions in 28 U.S.C.A. §2680. If one of these exceptions is applicable, "(t)he provisions of this chapter and §1346(b) of this title shall not apply . . ." 28 U.S.C.A. §2680. In such a case, a District Court must dismiss for lack of subject matter jurisdiction."

Id. at 876. *See also, Morris v. United States,* 521 F.2d 872, 874 (9th Cir. 1975); *Myers and Myers, Inc. v. United States Postal Service, supra; Griffin v. United States,* 500 F.2d 1059, 1063 (3d Cir. 1974); *United States v. Taylor,* 236 F.2d 649, 652 (6th Cir. 1956); *appeal dismissed,* 355 U.S. 801 (1957); *Konecny v. United States,* 388 F.2d 59, 62-63 (8th Cir. 1967); *Bub Davis Packing Co., Inc. v. United States,* 443 F.Supp. 589, 593 (W.D. Tex. 1977).

The leading Supreme Court case on the §2680(a) exception, while not specifically deciding this issue,

contains language which is highly persuasive. That Court in *Dalehite v. United States,* 346 U.S. 15 (1953), stated:

> Turning to the interpretation of the (Federal Tort Claims) Act, our reasoning as to its applicability to this disaster starts from the accepted jurisprudential principle that no action lies against the United States unless the legislature has authorized it . . . our decisions have interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions.

Id. at 30, 31. Section 2680(a) reflects an effort by Congress to protect the Government from claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. As a result, sovereign immunity is not waived with regard to any claim which falls within one of the §2680 exceptions, and jurisdiction under 28 U.S.C. §1346(b) is lacking. Thus, the Court finds that the §2680(a) exception is jurisdictional and may be properly raised at this stage of the litigation.

II.

In support of the contention that the claim in this case falls within the "discretionary function" exception, the Defendants cite the case of *Shaller v. United States,* 202 Ct. Cl. 571 (1973), *cert denied,* 414 U.S. 1092 (1973). The plaintiff in *Shaller* received an incentive award of $300 under 5 U.S.C. §4501, *et seq.* His action in the Court of Claims asserted that he was entitled to an

award of $1,568,000 for his contributions made to the Polaris missile program. In the course of its decision the Court of Claims held that as a matter of law the plaintiff was not entitled to recover the additional award, the Court of Claims observed that, "Under incentive awards, legislation (particularly 5 U.S.C. §4501 *et seq.* and its predecessor statute, 5 U.S.C. §2121 *et seq.*) heads of government agencies have discretion to make or not make awards, and to tailor the awards as they see fit in accordance with administrative regulations." *Id.* at 596.

While this Court is not necessarily bound by a decision of the Court of Claims, the Court feels that the *Shaller* court correctly interpreted the incentive awards statutes noted in the above quotation.

After consideration of the leading cases which apply the §2680(a) exception, the Court concludes that the discretion exercised in this case falls within that exception. The Supreme Court in *Dahelite v. United States, supra,* states as follows:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of the programs and activities. It also includes determinations made by executives or administrators in establishing plans,

> specifications or schedules of operations. Where there is room for policy judgment and decision, there is discretion.

Id. at 35-36.

The broad standard of *Dahelite* has been circumscribed somewhat. *See Indian Towing Co. v. United States* 350 U.S. 61 (1956); *Rayonier Inc. v. United States,* 352 U.S. 315 (1957). The Fifth Circuit has said: "It is not a sufficient defense for the government merely to point out that some decision making power was exercised by the official whose act was questioned . . . (T)he question at hand here is the nature and quality of the discretion involved in the acts complained of." *Smith v. United States,* 375 F.2d 243, 246 (5th Cir. 1967); *cert. denied,* 389 U.S. 841 (1967). *See also Moyer v. Martin Marietta Corp.,* 481 F.2d 585, 594-597 (5th Cir. 1973). In determining which discretionary acts should be shielded by §2680(a), the Courts should be guided in part by the separation of powers doctrine and the proper role of the judiciary. *See Smith v. United States,* supra at 247-248. "(S)tate tort standards cannot adequately control those governmental decisions in which, to be effective, the decision maker must look to considerations of public policy and not merely to established professional standards or to standards of general reasonableness." *Hendry v. United States,* 418 F.2d 774, 783 (2d Cir. 1969) (withholding a ship's officer's license was held not to be protected by the discretionary function exception where the determination that the officer was unfit for duty was based on allegedly negligent psychiatric

examinations performed by employees of the U.S. Public Health Service.) *See also Gray v. United States,* 445 F.Supp. 337, 340 (S.D. Tex. 1978). ("The discretionary acts sought to be exonerated by §2680(a) must be conduct that brings to bear policy judgments . . .").

The purpose of the Government Employees Incentive Awards Program is "to improve Government operations and to recognize civilian employees by incentive awards." 5 C.F.R. §451.101 (1977). The implementation of this legislation involves, of necessity, policy judgments to be made by heads of government agencies. The nature of these decisions compel the conclusion that they are included with the §2680(a) exception. Thus, the Court lacks subject matter jurisdiction in this case.

An Order in accordance with this Opinion shall be entered simultaneously herewith.

DONE AND ORDERED in Chambers, at Jacksonville, Florida, this 24th day of October, 1978.

/s/ George C. Carr
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 76-340-Civ-J-C

CALVIN M. ANDERSON,

Plaintiff,

vs.

THE HONORABLE BENJAMIN F. BAILAR, Postmaster General of the United States Postal Service; THE HONORABLE JAMES E. WORKMAN, JR., Postmaster/Sectional Center Manager of the United States Postal Service, Jacksonville Sectional Center Facility, THE UNITED STATES POSTAL SERVICE, and UNITED STATES OF AMERICA,

Defendants.

ORDER

The Court has for consideration the Motion to Dismiss filed by the defendants. After consideration of arguments and memoranda of counsel, it is

ORDERED That the Motion to Dismiss is GRANTED. This case is dismissed with prejudice.

DONE AND ORDERED in Chambers, at Jacksonville, Florida, this 24th day of October, 1978.

/s/ George C. Carr
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-3653

CALVIN M. ANDERSON,
Plaintiff-Appellant,

versus

THE HONORABLE BENJAMIN F. BAILAR,
Postmaster General of the United States
Postal Service, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(JUNE 6, 1980)

Before AINSWORTH and GEE, Circuit Judges, and HUNTER,* District Judge.

PER CURIAM:

Upon consideration of briefs and oral arguments, we affirm upon the basis of the opinion of the district court.

AFFIRMED.

FILED JUN 30 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-3653

CALVIN M. ANDERSON,
Plaintiff-Appellant,

versus

THE HONORABLE BENJAMIN F. BAILAR, Postmaster General of the United States Postal Service, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

(June 30, 1980)

Before AINSWORTH and GEE, Circuit Judges and HUNTER, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

TITLE 39 U.S.C. §401

§401. General powers of the Postal Service

The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name;

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

(3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures;

(4) to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents, except as otherwise provided in this title;

(5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor;

(6) to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by

it, including, without limitation, any property or interest therein transferred to it under section 2002 of this title;

(7) to accept gifts or donations of services or property, real or personal, as it deems, necessary or convenient in the transaction of its business;

(8) to settle and compromise claims by or against it;

(9) to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes; and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates; and

(10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

Publ L. 91-375, Aug. 12, 1970, 84 Stat. 722

TITLE 39 U.S.C. §409

§409. Suits by and against the Postal Service

(a) Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28.

(b) Unless otherwise provided in this title, the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties, and the rules of procedure adopted under title 28 for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

(c) The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

(d) The Department of Justice shall furnish, under section 411 of this title, the Postal Service such legal representation as it may require, but with the prior consent of the Attorney General the Postal Service may employ attorneys by contract or otherwise to conduct litigation brought by or against the Postal Service or its officers or employees in matters affecting the Postal Service.

Pub. L. 91-375, Aug 12, 1970, 84 Stat. 725,

TITLE 28 U.S.C. §1339

§1339. Postal matters

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.

June 25, 1948, c 646, 62 Stat. 932.

TITLE 28 U.S.C. §2671

§2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or vanal forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

As amended July 18, 1966, Pub. L. 89-506, §8, 80 Stat. 307.

TITLE 28 U.S.C. §2674

§2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private

individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

TITLE 28 U.S.C. §2680(a)

§2681. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

June 25, 1948, c. 646, 62 Stat. 984; July 16, 1949, c. 340, 63 Stat. 444; Sep. 26, 1950, c. 1049, §§2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub. L. 86-168, Title II, §202(b), 73 Stat. 389,

TITLE 5 U.S.C. §4501

§4501. Definitions

For the purpose of this chapter —

(1) "agency means —

(A) an Executive agency;

(B) the Administrative Office of the United States

(C) the Library of Congress;

(D) the Office of the Architect of the Capitol;

(E) the Botanic Garden;

(F) the Government Printing Office; and

(G) the government of the District of Columbia; but does not include —

(i) the Tennessee Valley Authority; or

(ii) the Central Bank for Cooperatives;

(2) "employee" means —

(A) an employee as defined by section 2105 of this title, but does not include an employee covered by the merit pay system established under section 5402 of this title; and

(B) an individual employed by the government of the District of Columbia.

As amended Pub. L. 95-454, Title V, §503(a), Oct. 13, 1978, 92 Stat. 1183.

TITLE 5 U.S.C. §4502

§4502 General provisions

(a) Except as provided by subsection (b) of this section, a cash award under this chapter may not exceed $10,000.

(b) When the head of an agency certifies to the Office of Personnel Management that the suggestion, invention, superior accomplishment, or other meritorious effort for which the award is proposed is highly exceptional and unusually outstanding, a cash award in excess of $10,000 but not in excess of $25,000 may be granted with the approval of the Office.

(c) A cash award under this chapter is in addition to the regular pay of the recipient. Acceptance of a cash award under this chapter constitutes an agreement that the use by the Government of an idea, method, or device for which the award is made does not form the basis of a further claim of any nature against the Government by the employee, his heirs, or assigns.

(d) A cash award to, and expense for the honorary recognition of, an employee may be paid from the fund or appropriation available to the activity primarily

benefiting or the various activities benefiting. The head of the agency concerned determines the amount to be paid by each activity for an agency award under section 4503 of this title. The President determines the amount to be paid by each activity for a Presidential award under section 4504 of this title.

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 442.

TITLE 5 U.S.C. §4503

§4503. Agency awards

The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who —

(1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or

(2) performs a special act or service in the public interest in connection with or related to his official employment.

As amended Pub. L. 95-454, Title V, §502(a), Oct. 13, 1978, 92 Stat. 1183.

TITLE 5. U.S.C. §4506

§4506. Regulations

The Office of Personnel Management shall prescribe regulations and instructions under which the agency awards program set forth by this chapter shall be carried out.

As amended Pub. L. 95-454, Title V, §503(d), Oct. 13, 1978, 92 Stat. 1184.

5 C F R. §451.302 (1976)

"Section 451.302 (1976) Cash award, tangible benefits . . .

(b) Optional minimum award levels. Three minimum award levels are provided to allow agencies to choose the minimum level which would be most appropriate to the circumstances in which the agency operates. The minimum award level selected by the agency must be incorporated in the agency plan.

The optional minimum award levels are:

	Minimum award	Based on minimum tangible benefits totalling
Option A	$ 25	$ 250
Option B	50	500
Option C	100	1,000

A cash award shall not be granted for a contribution which does not meet the minimum award level selected by the agency. A cash award at the rate shown in paragraph (c) of this section shall be granted for a contribution which meets the minimum award level selected by the agency.

(c) Award scale. The amount of a cash award for tangible benefits shall be based on the following table, except when a different amount is justified for special reasons.

Tangible Benefits	Amount of Award
$250-$1,000	Minimum award in accord with agency plan, plus $5 for each additional $50 of tangible benefits, or fraction thereof, above the minimum benefits required by agency plan.
$1,001-$10,000	$100 for the first $1,000 in benefits plus $5 for each additional $100 or fraction thereof.
$10,001-$20,000	$550 for the first $10,000 in benefits plus $5 for each additional $200 or fraction thereof.

Tangible Benefits	Amount of Award
$20,001-$100,000	$800 for the first $20,000 in benefits plus $5 for each additional $1,000 or fraction thereof.
$100,001 or more	$1,200 for the first $100,000 in benefits plus $5 for each additional $5,000 or fraction thereof.

(d) Award over $5,000. An agency head may not grant a cash award above $5,000 without prior approval of the Commission. The maximum cash award is $25,000" (A-73).

5 C.F.R. §451.304(b) (1976)

Section 451.304(b) (1976) states the effect of the acceptance by an employee of a cash award:

"(b) Further claim: The acceptance of a cash award under this part constitutes an agreement that the use by the Government of a contribution idea, method or device for which an incentive award is made does not form the basis of a further claim of any nature against the Government by the employees, his heirs, or his assigns" (A-75).